IP 02-1744-C Y/K Hague v Thompson Distribution
Judge Richard L. Young Signed on 2/9/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Mark Hague, CYNTHIA HAGUE, MARK BROWN, BERNARD DUBOIS, ANNA PERREY, Plaintiffs, vs. THOMPSON DISTRIBUTION COMPANY, MUTUAL PIPE AND SUPPLY COMPANY, JOHN T. THOMPSON, Defendants.	)	NO. 1:02-cv-01744-RLY-TAB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARK HAGUE, CYNTHIA HAGUE, MARK BROWN, BERNARD DUBOIS, AND ANNA PERREY,	)	
Plaintiff,	)	**1:02-cv-1744-RLY-TAB**
vs.	)	
THOMPSON DISTRIBUTION COMPANY, INC. d/b/a MUTUAL PIPE AND SUPPLY COMPANY AND MUTUAL PIPE AND SUPPLY COMPANY, and JOHN T. THOMPSON, In His Individual Capacity and in his Official Capacity as Representative of Thompson Distribution Company, Inc.,	)	
Defendant.	)	

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, John T. Thompson, is the owner and President of Defendant, Thompson Distribution Company, Inc. ("Thompson Distribution"). In November 2001, Thompson Distribution bought most of the assets of Mutual Pipe and Supply Company ("Mutual"), which were the subject of an auction forced by its creditors. Each of the Plaintiffs were employees of Mutual who were hired by Thompson Distribution following the asset purchase to continue in roles similar to those they had assumed in the Mutual organization. In February of 2002 Thompson Distribution terminated the employment of all five of the Plaintiffs. They have brought this lawsuit claiming that Thompson Distribution discriminated against them by terminating their employment due to their age in violation of state anti-discrimination statutes or

their race in violation of both state and federal anti-discrimination statutes and in order to interfere with their abilities to attain health benefit rights, in violation of the Employee Retirement Income Security Act ("ERISA"). In addition, Plaintiffs claim that Mr. Thompson, individually, tortiously interfered with their contractual relationship with Thompson Distribution. Defendants have moved for summary judgment on all claims.[1]

Standard of Review

Summary judgment is only to be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine fact exists, the court examines the pleadings and the proof as presented in depositions, answers to interrogatories, admissions, and affidavits made a part of the record. *First Bank & Trust v. Firstar Information Services, Corp*., 276 F.3d 317 (7th Cir.2001). The court also draws all reasonable inferences from undisputed facts in favor of the non-moving party and views the disputed evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986). However, the non-moving party may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; rather it must go beyond the pleadings and support its contentions with properly admissible evidence.

[1]Thompson Distribution evidently continued for some time to utilize the Mutual Pipe and Supply Company name in conducting some of its business. That explains why Mutual Pipe and Supply Company is listed as a d/b/a for Thompson in the caption. What neither of the parties explain is why Mutual Pipe and Supply Company would be listed as a separate defendant in this action. The court assumes it was listed simply because the name continued to be used by Thompson Distribution in connection with its business. There appears to be no basis for any distinction between the two names in connection with establishing liability in this lawsuit and therefore the court will treat the listing of Mutual Pipe and Supply Company as a Defendant as duplicitous and will refer only to Thompson Distribution when discussing the Defendant which terminated the Plaintiff's employment. "Mutual" is used in this entry as a name for the entity which operated the business prior to Thompson Distribution's purchase of the assets.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Only competing evidence regarding facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). And, if the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment is properly granted to the moving party. *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir.1996).

FACTUAL BACKGROUND[2]

[2]The Local Rules of this district require the moving party to include in a supporting brief "a section labeled 'Statement of Material Facts Not in Dispute' containing the facts potentially determinative of the motion as to which the moving party contends there is no genuine issue." Local Rule 56.1(a). The opposing party is to file a response brief which "shall include a section labeled 'Statement of Material Facts in Dispute' which responds to the movant's asserted material facts by identifying the potentially determinative facts and factual disputes which the nonmoving party contends demonstrate that there is a dispute of fact precluding summary judgment." Local Rule 56.1(b). "For purposes of deciding the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts: are specifically controverted in the opposing party's 'Statement of Material Facts in Dispute' ...." Local Rule 56.1(e).

While Plaintiffs, as opposing party, included a section in their brief entitled "Statement of Material Facts in Dispute", the section makes no attempt to identify the potentially determinative facts or even those facts set out by Defendants which Plaintiffs dispute. Instead, the section amounts to an unnecessarily long 17 page narrative which is full of immaterial facts and citations to affidavit paragraphs which contain speculation, opinion, hearsay and conclusory statements. The clear intent of the Local Rule is to have the parties help the court focus its attention on the key material facts and whether or not they are in dispute. Plaintiffs have offered up factual "spin"within the section of their brief which is supposed to do nothing more than identify material facts in dispute. That is not what is intended by the Local Rule and it in no way furthers the analytical process. Failing to specify what material facts are truly in dispute is not only an ineffective method of arguing the motion, but such a failure also risks the court simply adopting the facts as set forth by the moving party because of the Local Rule violation.

In this case the court is examining the facts, as presented by both sides, in a light most favorable to Plaintiffs. However, where a material fact presented by Defendants does not readily appear to be contested by Plaintiffs, the court is not inclined to search through 17 pages of narrative to see if there might be a clue indicating possible disagreement. The Local Rules are drafted, after study and input from numerous practitioners in the district, with the idea of moving

Plaintiff Mark Hague was an owner and Vice President and General Manager of Mutual at the time it was forced to sell its assets. Prior to Thompson Distribution purchasing the assets of Mutual, Mr. Thompson and Mr. Hague had several discussions about acquisition of the business. As a result of one of those discussions, Mr. Hague was asked to compile a list of employees whom he thought should be hired by Thompson Distribution if and when it took over the business. Mr. Hague made out the list which included himself and the other Plaintiffs in this litigation. He and Mr Thompson discussed the employees and their roles with the company. Mr. Hague indicates that Mr. Thompson also asked him about any personal or health problems the listed employees might have. After interviewing each of the Plaintiffs, Mr. Thompson offered them employment with Thompson Distribution when it took over operations on November 28, 2001.

Mark Brown

Mark Brown is Caucasian and was hired to continue on in his role as Warehouse Manager. At the time he was hired by Thompson Distribution he was 50 years old and had been the Warehouse Manager since 1995. Brown was responsible for the operations of the warehouse including supervising employees who would take care of the loading and shipping of freight and supplies in and out of the warehouse. His experience with warehouse systems and supervision of drivers and warehouse employees was what Mr. Thompson saw as valuable to Thompson Distribution.

Prior to having his employment with Thompson Distribution terminated on February 22,

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litigation through the court in as efficient a manner a possible. Ignoring that effort can subject a party to an unnecessary risk and may, in the future, result in more than a footnoted scolding.

2003, Mr. Brown was counseled several times by Mr. Thompson regarding his yelling and use of foul language when giving direction or criticizing the employees who worked under him. Brown also allowed the return of two boilers which Thompson Distribution possessed to a supplier for credit against Mutual's past account with the supplier. This occurred pursuant to a deal struck by Mark Hague prior to the sale of assets in an effort to reduce Mutual's debt to that supplier. Mr. Thompson believed the boilers to be the property of Thompson Distribution and was angry with Mr. Brown and Mr. Hague over the fact that the supplier was allowed to take the boilers, which he believed were worth approximately $7,000 to $8,000, off the property. Brown and Hague claim that prior to the asset sale the supplier had been unable to pick up all the inventory that was the subject of the return for credit agreement so it was agreed that its truck would return to pick up the two boilers at a later date. Mr. Thompson claims he decided to terminate Brown's employment because of this event and because of Brown's inability to supervise employees without cursing and yelling at them. Mr. Brown's replacement was an African American who has since been fired by Thompson Distribution.

Bernard Dubois

Mr. Dubois was hired by Thompson Distribution for inside sales due to his specific knowledge of hydronic heating systems. Dubois, a Caucasian, had been employed by Mutual for approximately a year when the assets were sold to Thompson Distribution. His employment with Thompson Distribution was short lived as he was also terminated on February 22, 2002. He was 66 years old at the time Mr. Thompson hired him and, according to Mr Hague, Mr Thompson expressed concern over Dubois' age when they initially discussed his being on Hague's list of people to hire.

During the time Dubois worked for Thompson Distribution, it is uncontested that sales of hydronic heating equipment were extremely low. Plaintiffs claim that this was because Mr. Thompson failed to sit down with suppliers to iron out the lingering effect of Mutual's past credit problems, hence leaving Dubois without inventory to sell. Also, Mrs. Thompson, who assists her husband with the operation of the business, reported to her husband that she found Mr. Dubois sleeping on one occasion when she went to his office. Mr. Thompson himself had witnessed Dubois at his desk reading materials unrelated to his work.. Dubois denies sleeping on the job, but indicates that due to his own hearing problem, someone could have slipped into his office unnoticed and may have thought he was asleep if his back was to the door. He admits that he would often lunch in his office and read books or other materials during that time. Mr. Thompson claims to have terminated Dubois' employment because he was not meeting the sales expectations of the company. No one was hired to replace Mr. Dubois, but a younger Caucasian male assumed some of his responsibilities.

Anna Perrey

Thompson Distribution hired Anna Perrey to continue working in the purchasing area. She was a 63-year old Caucasian at the time she was hired by Thompson Distribution. She had been employed by Mutual since 1995. Mr. Thompson believed Ms. Perrey's experience with the vendors and knowledge of the "Profit 21" software system would benefit Thompson Distribution as it took over and learned to operate the business.

Ms. Perrey was also terminated on February 22, 2002. Mr. Thompson testifies that he found her to be the most defiant of him in his role as head of the company. He claims he terminated her employment because it was clear she saw Mr. Hague as the boss and would not

do what Mr. Thompson asked her to do without clearing it first with Mr. Hague. According to Mr. Thompson he became increasingly frustrated with her attitude towards him and finally determined that statements such as " we don't do it that way" indicated she was not going to accept his authority. He replaced her with Jennifer Thompson, a younger African American, with whom he had worked in the past. Jennifer Thompson's employment with Thompson Distribution was later terminated.

Cynthia Hague

Cynthia Hague is Mark Hague's wife. She began working for Mutual in the purchasing department in 1989 and switched to accounts payable in 1999. She became responsible for accounting and financials in the summer of 2001 and was in that position at the time of the sale of Mutual's assets. She is Caucasian and was 49 years old when she was hired by Thompson Distribution. Mr. Thompson hired her as a contract employee initially and then as a regular employee in January of 2002. He believed her experience in accounting and with the Profit 21 software system would be helpful to the company. She was terminated on February 15, 2002. Mr. Thompson claims he fired her because she had little knowledge of or experience with the Profit 21 software system and was insubordinate towards him. She was not replaced. Mrs. Thompson assumed the responsibilities of Mrs. Hague.

Mr. Thompson indicates that he learned the week before her termination that Mrs. Hague was not very familiar with the Profit 21 software system. He also testifies that he was upset because Mrs. Hague was working on wrapping up Mutual's financial affairs during the work day when she should be devoting her time to Thompson Distribution. The Plaintiffs claim that Mr. Thompson was well aware that Mutual's financials had to be cleared out of the computer

system and its files physically packed up before Thompson Distribution's data cold be entered into the system. Mrs. Hague also maintains that although she was not particularly familiar with the Profit 21 software, she let Mr. Thompson know that fact up front and was told that would not be a problem.

Mark Hague

Mr. Thompson viewed Mr. Hague as critical to the transition because of his experience with the suppliers and knowledge of the products, customers and employees, generally. Hague was 49 years old when hired by Thompson Distribution as its Sales, Marketing and quotations Manager, and is Caucasian. He and his father had owned the business and had met with Mr. Thompson several times prior to selling him Mutual's assets. Mr. Hague says that during one of those pre-purchase meetings, he told Mr. Thompson that there would be a significant issue with suppliers and vendors regarding money still owed to them by Mutual and pending bids and specifications the suppliers had provided in connection with other outside project contracts which Thompson Distribution would acquire as part of the assets. According to Mr. Hague, he was told by Mr. Thompson that vendors could be told that once he took control he would sit down and negotiate any such issues with them.

Mr. Hague's employment with Thompson Distribution was terminated on February 15, 2002 at the same time his wife was fired. Mr. Thompson claims that he terminated Mr. Hague's employment for several reasons. First, Mr. Hague had approved of Mr. Brown's allowing the one supplier to pick up and take two boilers back from the warehouse for credit to Mutual's account. Second, Mr. Hague was selling product and quoting projects at below the minimum 20% profit level that Mr. Thompson had instructed him to maintain. In addition, Mr. Thompson

says that he learned that Mr. Hague had, without authority, informed several suppliers that Thompson Distribution would pay them for services or supplies they had provided to Mutual for which they had not received compensation. As a result, Mr. Thompson believed he could not trust Mr. Hague to act in the best interest of Thompson Distribution. After letting Mark Hague go, Mr. Thompson hired Kevin Jones, a 27 year old African American, to take over Hague's responsibilities. Mr. Jones has since resigned from employment with Thompson Distribution.

John Thompson

Mr. Thompson is an African American. He was 47 years old at the time he hired the Plaintiffs to work for Thompson Distribution. As owner and President of the company he had full authority to hire and fire all employees. He believed the Plaintiffs to have skills which would be valuable to Thompson Distribution as it took over the business on November 28, 2001. However, by February of 2002 not only had he determined that each had specific shortcomings, but he believed generally, as a group, their allegiance remained with Mutual and Mr. Hague and that they were not putting forth their best efforts nor interested in following his direction. He believed they were not

working with the best interests of the new owner in mind. He terminated their employment within ninety days of their being hired.

At the time he hired the Plaintiffs, Mr. Thompson provided each of them with a welcoming letter indicating, among other things, that health benefits would be provided following the employee's ninety day trial period. They also each received an employee handbook which discusses the ninety day trial period during which an employee is evaluated for

continued service. The handbook indicates that group health benefits are provided to all full-time employees on a cost sharing basis. As it turns out, though Thompson Distribution intended to set up a shared cost health benefit plan, and worked with an insurance agent toward that end, no plan was ever put into effect because, when the plan was circulated less than the required fifty per cent of the employees indicated they wished to participate.

The company rules are also spelled out in the handbook that was given to all employees, along with the "typical disciplinary steps taken for minor offenses." These steps are progressive in nature starting usually with a verbal warning and moving to discharge with the fourth violation. However, the handbook also states that it is within the company's discretion to discharge an employee even on a first offense. When Mr. Thompson discharged the Plaintiffs, he did not explain to them the individual reasons for their termination.

Discrimination Charges

A little more than five months after their termination, the Plaintiffs all filed charges of discrimination with the Equal Employment Opportunity Commission, claiming Thompson Distribution terminated their employment on the basis of their race, age and, with the exception of Mr. Brown, their disabilities. The charges alleged violations of federal discrimination laws and were dually filed with the Indiana Civil Rights Commission under the work sharing agreement between the state and federal agencies. No complaint was filed pursuant to state law with the Indiana Commissioner of Labor.

After informing the Plaintiffs that it had determined that Thompson Distribution did not have the requisite number of employees to fall under the auspices of the federal discrimination

laws, the EEOC issued right to sue notices to the Plaintiffs, indicating the end of the administrative process. Plaintiffs filed their Complaint in this lawsuit in November of 2002 alleging discrimination in violation of federal statutes and ERISA violations. An Amended Complaint was filed in September of 2003, wherein the federal discrimination claims were dropped and state law claims of race and age discrimination were added along with the tortious interference claim against Mr. Thompson, personally. The Plaintiffs never pursued a determination of their discrimination charges with the Indiana Civil Rights Commission and the parties never agreed in writing to litigate state law discrimination claims in court.

ANALYSIS

Defendants seek summary judgment on all of the claims raised in Plaintiffs' Amended Complaint. Some of Plaintiffs' claims are easily disposed of, but others require a more detailed factual analysis to determine if summary judgment is appropriate.

Claim Under ERISA for Interference with Attainment of Benefit Rights

The first count of Plaintiffs' Amended Complaint alleges that they were terminated in order that Thompson Distribution could avoid the higher costs of coverage under its insurance plan. They point to Mr. Thompson's concern with people's health problems which he expressed in early discussion with Mr. Hague. The big problem with this claim is that there is no health benefit plan in place at Thompson Distribution and there never was a plan during the time Plaintiffs were employed.

It is easy to see why the Plaintiffs might have thought that there was an insurance plan in

place at Thompson Distribution when they filed their Amended Complaint. After all, they received a letter at the time of their employ which stated that health benefits would be provided after ninety days. The employee handbook also said there would be health insurance and the insurance applications they filled out would have seemed to confirm it. However, through discovery they learned no health insurance plan was ever put in place.

The court is a bit frustrated with the representation in Plaintiffs' brief that there has been no explanation for the fact that Thompson Distribution payroll records show that for one pay period employees had deductions taken from their pay checks under a code indicating the deduction was for insurance. Evidently, Plaintiffs' counsel hoped that the court would not be advised of the deposition testimony that specifically addressed the question of why the payroll deductions occurred. As pointed out by Defendants in their reply brief, Norma Thompson, Mr. Thompson's wife and the person who handled much of the human resources responsibilities for the company, specifically testified in deposition that the deductions were applied in anticipation of employee approval of the health insurance plan and a forthcoming premium. When an insufficient number of employees voted in favor of the plan to allow the insurer to offer it, the deductions were reimbursed by Thompson Distribution in a later check.

In short, there is no benefit plan. Both Plaintiffs and Defendants agree that there must be a welfare benefit plan, as that term is described in ERISA, for the claim in Plaintiffs' first count to be viable. *See*, *Postma v. Paul Revere Life Ins. Co.*, 223 F. 3d 533, 537 (7th Cir. 2000). An employer establishes or maintains a plan if it enters a contract with the insurer and pays its employees' premiums. *See, Brundage-Peterson v. Compcare Health Services Ins. Corp*., 877

F.2d 509, 511 (7th Cir.1989). There is no evidence to support that Thompson Distribution entered into any insurance contract or made any premium payment. In fact, since the plan was rejected by the employees, there can be no reasonable argument that Thompson Distribution's intent in terminating Plaintiffs' employment was to save money on health insurance. This is true regardless of Mr. Hague's claim that Mr. Thompson was very interested in any personal or health problems the Plaintiffs' might have had at the time they were hired. Consequently, Plaintiffs' may not maintain a claim under ERISA.

Tortious Interference with Employment Contract

Plaintiffs have pled a claim against Mr. Thompson, individually, arguing that he tortiously interfered with their employment relationship with Thompson Distribution. This claim is easily concluded as well. Mr. Thompson was acting as the company's President and owner, with undisputed power to hire and fire, when he terminated Plaintiffs' employment. Under Indiana law, an officer or director acting within the scope of his professional duties for an entity, may not be held liable for inducing the breach of a contract of employment that entity might have with an employee. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1234 n.7 (Ind.1994). Mr. Thompson's scope of responsibility for Thompson distribution included both hiring and firing the Plaintiffs.

Plaintiffs argue, without citation to supporting authority, that because Mr. Thompson testified that anyone who engaged in discrimination would not be representing Thompson Distribution and because they allege he discriminated against them, Mr. Thompson can be held personally liable for tortious interference with Plaintiffs' "at will" employment contracts. The proposition simply doesn't square with Indiana law and the requirement that an individual

officer or employee of the company be acting for his own benefit and outside the scope of his or her responsibilities in order to be held liable for tortious interference. *Leslie v. St. Vincent New Hope, Inc*., 873 F.Supp. 1250 (S.D.Ind. 1995); *Winkler v. V.G. Reed & Sons, Inc*., 638 N.E.2d 1228, 1234 n.7 (Ind.1994); *Martin v. Platt,* 386 N.E.2d 1026, 1027 (Ind. App. 1979). Mr. Thompson is entitled to summary judgment in his favor on the tortious interference claim.

State Law Discrimination Claims

Defendants argue that Indiana statutes do not provide a private right of action for either age or race discrimination. The Indiana Civil Rights Law is codified in Article 9 of Title 22 of the Indiana Code. Section 1 states that it is against public policy for an employer to discriminate with regard to employment based upon race and the same is considered a discriminatory practice. Ind. Code § 22-9-1-2(b). Section 2 provides that it is against public policy and an unfair employment practice for an employer to dismiss an employee based upon his or her age if the employee has attained forty years of age. Ind. Code § 22-9-2-2. Under the statutory scheme in place in Indiana, the Indiana Civil Rights Commissison has the power to "receive and investigate complaints alleging discriminatory practices." Ind. Code § 22-9-1-6(e). Unfair employment practices, such as a claim of age discrimination are the province of the Commissioner of Labor. Ind. Code § 22-9-2-5.

Plaintiffs did not file a claim or complaint with the Commissioner of Labor in Indiana. They each filed charges with the EEOC alleging age and race discrimination in violation of federal statutes. However, Plaintiffs have since abandoned their claims under federal law, apparently conceding the number of people employed by Thompson Distribution is insufficient

for federal statutes to apply. While, generally, a violation of federal age discrimination laws would likely amount to a violation of Ind. Code § 22-9-2-2. There is no private right of action provided under state law. A complaining party must take up age discrimination complaints with the Commissioner of Labor, who has the power to investigate, facilitate and hold hearings on the complaint. Other than that, the statute offers no remedy to an individual. *Helman v. AMF, Inc*., 675 F.Supp. 1163, 1165 (S.D.Ind. 1987). Plaintiffs acknowledge this in their reply brief and agree that their age claims should be dismissed.

On the issue of Plaintiffs' race discrimination claim, there was a dual filing of the EEOC charge with the Indiana Civil Rights Commission. However, claims of discrimination brought to the attention of the Civil Rights Commission pursuant to Article 9 may only proceed to court pursuant to an appeal of the final Commission decision, Ind. Code § 22-9-8-1, or through a written agreement between the parties, entered into prior to any Commission hearings. Ind. Code § 22-9-1-6. There is no unilateral right to pursue claims through litigation and the Plaintiffs did not seek to have the Commission review

their claims after receiving notification that the EEOC would not be reviewing the claims further.

Plaintiffs argue that the work sharing agreement between the EEOC and the ICRC is meant to minimize duplication of effort and requires the EEOC to transfer the claim to the ICRC after sixty days if it finds it lacks jurisdiction. According to Plaintiffs, because they received a notice from the EEOC before the expiration of sixty days that they were required to bring suit within ninety days of the notice or lose their right to sue, there should be some accommodation.

What Plaintiffs ignore is that their charges filed with the EEOC alleged only violations of federal law. The notice they received did not suggest that any state law claims had to be brought to court within ninety days. The EEOC filing may have served to toll any state law limitations period, but if they wanted to pursue a state law claim it had to be done with the ICRC, sans written agreement with Thompson Distribution to litigate the claim. Accordingly, summary judgment is appropriate with respect to the state law discrimination claims.

Section 1981 Claims

That leaves the race discrimination claims Plaintiffs make pursuant to 42 U.S.C. § 1981(b). Again, the Plaintiffs maintain that Thompson Distribution let them go because of their race and replaced them with African Americans. The method and order of proof applicable to the more familiar Title VII (42 U.S.C. § 2000 *et seq.)* claims of discrimination are applicable to a Section 1981 claim as well. *Bennett v. Roberts*, 295 F.3d 687, 697 (7th Cir. 2002). Thus, absent direct evidence, a plaintiff may prove intentional discrimination by employing the burden-shifting test first set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973).

Following the *McDonnell Douglas* template, a prima facie case of discriminatory termination is established by Plaintiffs demonstrating that: 1) they are each members of a protected class (a particular race in this instance); 2) they were meeting their employer's legitimate performance expectations; 3) they were discharged; and 4) they were replaced by someone outside the protected class.[3] *Id.* If a prima facie case is established, the burden of

[3]Though not argued by the Plaintiffs in this case, under some circumstances the Seventh Circuit has modified the last element of the *McDonnell Douglas* template, eliminating the requirement that there be a showing that the plaintiff was replaced by someone outside the protected class and replacing it with a requirement that the plaintiff show that others outside the protected class, and similarly situated to the plaintiff, were treated more favorably. *See, e.g.*

production falls to the employer to articulate a nondiscriminatory reason for the termination. *Volovsek v. Wisconsin Dept. of Agriculture*, 344 F.3d 680, 692 (7th Cir. 2003). If the employer proffers a facially legitimate basis for terminating Plaintiffs' employment, the burden shifts back to the Plaintiffs to show that the reasons proffered are a pretext for discrimination. *O'Neal v. City of New Albany*, 293 F.3d 998, 1005 (7th Cir. 2002). They may establish pretext with evidence that Thompson Distribution was more likely than not motivated by a discriminatory reason or that its explanation is not worthy

of credence, i.e., the explanation is factually baseless, it did not actually motivate the company, or it was insufficient motivation for a termination. *Id*.

Thompson Distribution bases its request for summary judgment on the Section 1981 claims on what it claims is a lack of evidence that any of the Plaintiffs were satisfying its legitimate employment expectations and that several of the plaintiffs were not replaced by African Americans. Finally, Thompson Distribution argues that even if a prima facie case exists, it has articulated legitimate reasons for firing each of the Plaintiffs and they have failed to satisfy their burden of producing evidence to support an argument that those reasons are pretext. The court will examine the claims of each of the Plaintiffs individually.

Bernard Dubois

Mr. Dubois was hired for inside sales and, according to Thompson Distribution, was fired because sales in his area of specialty were extremely low. Mr. Dubois was not replaced and

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Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1035 (7th Cir. 1999).

Thompson Distribution did not focus on hydronic systems after his departure. Another Caucasian who worked in inside sales assumed any of his remaining responsibilities. Dubois admits that sales in his area were very low. He offers excuses for why the sales were low, but the court is not here to decide whether a company sets reasonable goals or if it was fair to expect him to meet sales goals in light of other situations. Fairness is not the issue and the court does not sit as a super-personnel committee. *Heerdink v. Amoco Oil Co.*, 919 F.2d 1256, 1260 (7th Cir. 1990). In short, Mr. Dubois has failed to establish that he was meeting the expectations of Thompson Distribution or that he was replaced by an African American and therefore he has failed to establish a prima facie case of discrimination based upon race.

Cynthia Hague

Mrs. Hague claims that because she had only recently begun working in the accounting area with Mutual at the time the assets were sold, it was unreasonable to expect her to have a firm grasp on the Profit 21 accounting software system in use at the company. She adds that Mr. Thompson was aware that she had no expertise with the software system and was not claiming to be an accountant. Finally, not denying that she was working on closing out the financials books of Mutual, she maintains in a rather self- serving conclusory affidavit that Mr. Thompson was well aware that she needed to close out Mutual's books and pack away the physical files before she could work on Thompson Distribution's accounts and he never said anything about her tending to these tasks prior to terminating her.

In addition to arguing that Mrs. Hague was not meeting Thompson Distribution's expectations, the Defendants maintain that Mrs. Hague was not replaced by an African American

and therefore has failed to meet two essential criteria of a prima facie case.[4] John Thompson testified that his wife, an African American already employed by the company, took on any of the responsibilities previously handled by Mrs. Hague. So, though she was not replaced, Hague's work was absorbed by a non-Caucasian individual. Where a terminated employee is not replaced, but the job responsibilities are absorbed by other employees, the fourth prong of the McDonnell Douglass test is satisfied if the individuals who take over the terminated employee's responsibilities are not of that employee's race. *Michas v. Health Cost Controls of Illinois, Inc*., 209 F.3d 687, 693-694 (7th Cir. 2000); *Bellaver v. Quanex Corp*., 200 F.3d 485, 495 (7th Cir. 2000).

However, there is no question of material fact as to whether or not Mrs. Hague was meeting the expectations of Thompson Distribution. She was not. She admits to a lack of experience and mastery of the Profit 21 software. Pointing out that a Profit 21 consultant was brought in after she left and that neither Mr. or Mrs. Thompson had a mastery of the software either, does nothing to diminish what she was expected to accomplish for Thompson Distribution, but could not deliver. In response to the Defendants' charge that she was working on matters for Mutual during working hours, she insists that certain wrap up tasks had to be accomplished with regard to Mutual's finances before she could take on Thompson

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[4]Defendants actually make an additional broad assertion with respect to all Plaintiffs, arguing that because they testified in their depositions that they did not know who assumed their duties or replaced them, they can not prevail because they can not establish the final required element that they were replaced by individuals outside their race. This is a rather specious argument in light of the fact that through John Thompson's deposition it was determined that some of the Plaintiffs were indeed replaced by African Americans. The question is not whether or not the Plaintiffs have or had personal knowledge of who replaced them, the question is whether or not in fact they were replaced by an African American or someone who was not Caucasian.

Distribution's accounts. This is supported only by her own self serving affidavit. She can not rely on such self benefitting assertions to defeat a summary judgment motion without some additional factual support. *McDonnell v. Cournia*, 990 F.2d 963, 969 (7th Cir. 1993).

Thompson Distribution, not Mrs Hague, defines its employment expectations. Unless, there is evidence to contradict its stated expectations or draw those stated expectations into question, self serving statements by any of the Plaintiffs as to what was fair to expect or why they could not meet expectations make no difference. One of the big problems Mrs. Hague has, and all the Plaintiffs have, in attempting to draw the employment expectations into question is that Mr. Thompson made it clear in his hiring letter to each of them that there would be a ninety day period in which their value to the company would be evaluated. It is not as though there are years or even months of satisfaction and well defined rolls that precede the termination decision. In fact, it is patently clear from the deposition testimony of Mr. Thompson that as disappointed as he may have been in the individual deficiencies of the Plaintiffs, there was an equal or greater overriding perception, and corresponding disappointment, that as a group these folks were not ready to, figuratively, turn over the baton to the new conductor. This evaluation by Mr. Thompson, even if only a perception, is reinforced by the responses of Mrs. Hague and the other Plaintiffs to the individual criticisms of their performance. "I obviously had to close down and pack away Mutual's physical files" is a prime example of Mrs. Hague making her own assessment of what was important as opposed to focusing on the tasks assigned by the new owner, Mr. Thompson. The court finds no reasonable basis to doubt Mr. Thompson's stated basis for firing Mrs. Hague.

Mark Brown

The remaining Plaintiffs were all replaced by African Americans. Consequently, there is no basis to challenge their establishing the fourth element of a prima facie case. However, again, Defendants maintain that each Plaintiff was failing to meet the legitimate expectations of Thompson Distribution. With respect to Mark Brown, Mr. Thompson says he expected Brown not to utilize foul and degrading language when supervising his staff and warned Mr. Brown on more than one occasion of the need for him to change the manner in which he addressed those who worked for him.[5] In addition, Thompson claims to have been upset with Brown's roll in allowing boilers to be picked up from the Thompson Distribution warehouse by a supplier for credit to Mutual's account.

Brown's retort is not to deny any of this, but to argue that Mr. Thompson had hired warehouse drivers that were unqualified and who frustrated him. In addition he maintains that his cursing did not include some of the more vulgar words in that lexicon and that Mr. Thompson had told him that he wanted a "Christian place to work." Why either of these responses is material is not said. While he does not deny that he allowed the supplier to pick up the boilers, Brown maintains that he had no reason to know what Mr. Thompson's purchase terms might have been and since Mr. Thompson was not at the warehouse that day he had no way to check with him on the propriety of honoring a deal that was previously struck. None of

[5]Other than Mr. Brown, each of the Plaintiffs complain that they were not warned of any performance problems, had no written job descriptions and that the stepped disciplinary policy was not followed. They suggest that this is a basis for doubting the reasons expressed by Defendants for their terminations. If plaintiffs had not been in a probationary period and had this not been a situation where Mr. Thompson was trying to determine how to operate his new business with a more limited staff than had existed with Mutual, the lack of a job description or series of warnings might weave some thread of doubt through the scenario. But, as indicated previously by the court, the evidence of record does not detract from and in fact tends to support Thompson's perception that these people's loyalties still lie with Mutual and Mr. Hague.

this draws into question Mr. Thompson's reason for firing him or the fact that he was not satisfying the legitimate expectations of Thompson Distribution that he not curse at his employees.

Anna Perrey

Mr. Thompson considered Ms. Perrey to be the employee who acted in the most insubordinate way towards him. According to Mr. Thompson she at times would respond to his requests by saying "we don't do it that way" or by asking him if he had spoken with Mr. Hague about the subject. He indicates he terminated her because she continually ignored his direction and turned to Mr. Hague to obtain direction or confirm her position with respect to the Mr. Thompson's requests.

Ms. Perrey, who acted as a purchasing representative, claims she never refused to do anything Mr. Thompson asked of her and never told him "we don't do it that way.". She admits that she did not know how to do advanced billing, a task assigned to her, and indicated to Mr. Thompson that she would check with Mr. Hague to see if he knew more about it, but says she never refused to do it. Further, she indicates that the software system was not set up to do advanced billing and she would not have known what price to charge unless a customer had already been quoted a specific price.

While viewing the facts in a light most favorable to Ms. Perrey might allow for a conclusion that she was meeting expectations and her deferral to Mr. Hague on advanced billing was misinterpreted, she has offered nothing that would cast doubt as to the legitimate reason articulated by Mr. Thompson for firing her. Even if his perception of her as insubordinate for turning to Mr. Hague to answer questions was founded on a misinterpretation, that does nothing

to cast doubt on his actually believing she was being insubordinate. In fact, it is easy to see how he would interpret her deferral to Mr. Hague as just another sign that she and the others intended to run the company as they had in the past instead of how he wanted his company run.

Mark Hague

Mr. Thompson's reasons for letting Mr. Hague go were in part founded in his belief that Plaintiffs' loyalty to Mutual and to Hague had yet to be relinquished. Hague's approval of the transfer of the boilers to a supplier for Mutual's credit and his telling suppliers that Thompson Distribution would be taking care of past credit and service provided to Mutual also supported Mr. Thompson's conclusion that Hague was not always acting in Thompson Distribution's best interest. Finally, Mr. Thompson had to

counsel Mr. Hague about selling product below the margin rate Thompson Distribution sought to obtain.

Hague's explanation with regard to suppliers was that he was only telling them that Mr. Thompson would negotiate Mutual's past debts or obligations with them and that this is what Mr. Thompson had said should be told to vendors and suppliers. According to Mr. Hague, Thompson Distribution's refusal to negotiate with these suppliers left it with product purchasing problems. He also states that the boilers transferred to the supplier were not assets that Thompson Distribution obtained pursuant to the terms of the sale. He goes on to argue that he never sold product at a loss and that it was necessary to sell product at a lower margin then what Mr. Thompson expected in order to be competitive in the business.

Again, none of this takes much away from the legitimate reason proffered by Thompson Distribution for Hague's termination. While there may be some question of fact as to exactly what Mr. Thompson told Mr. Hague to tell suppliers about past services and goods that Mutual had not paid for, the rest of Mr. Hague's explanation further enforces the feeling Mr. Thompson apparently had with regard to his allegiance and who was in charge. Mr. Hague was no longer an owner and if Mr. Thompson indicated he wanted a particular price point met, it was not for Mr. Hague to decide otherwise. Unless Mr. Thompson had specifically provided that discretion to Mr. Hague, and there is no evidence of that, it is understandable that Mr. Thompson felt that Mr. Hague was less than one hundred per cent committed to running the business pursuant to his direction when Hague sold product below the required price point. Further diminishing any likelihood that race was a motivating factor is the fact that Mr. Thompson had not contacted Hague's African American replacement until sometime after Hague was terminated.

CONCLUSION

The briefing and testimony offered by Plaintiffs in this case suggest an underlying tone from Plaintiffs that could best be described as follows: "He needed us to transition the business, used us for that purpose and then unceremoniously disposed of us." Even of that were true, there is nothing illegal about that tactic. The idea that Plaintiffs' dismissal was motivated by race, age or benefit plans seems to be more a bitter afterthought than an opinion based upon reasonable supporting evidence. The fact that three of the Plaintiffs were replaced by African Americans, in and of itself, proves nothing. It certainly is not surprising that an African American owned business would attract a higher number of qualified African American personnel. Nor is there any evidence that Thompson Distribution had no other Caucasian employees or that it fired no

African American employees. To the contrary, it did.

No material question of fact remains and for the reasons expressed in this entry, Defendant's Motion For Summary Judgment is GRANTED. A separate judgment shall be entered in favor of Thompson Distribution Company, Inc. and John T. Thompson.

SO ORDERED this ____ day of February, 2005.

_____

RICHARD L. YOUNG, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

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